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IN THE THIRD JUDICIAL DISTRICT COURT
SALT LAKE COUNTY, STATE OF UTAH

MIKE PETKE, Plaintiff, vs. UTAH SOCCER, LLC, d/b/a REAL SALT LAKE, a Utah limited liability company, Defendant.	**MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DISMISS OR, IN THE ALTERNATIVE, STAY THE PROCEEDINGS [*HEARING REQUESTED*]** Civil No. 190907265 Judge Patrick Corum

Mike Petke files this Memorandum of Law in Opposition to Defendant Utah Soccer, LLC d/b/a Real Salt Lake, a Utah limited liability company's ("RSL") Motion to Compel Arbitration and Dismiss or, in the Alternative, Stay the Proceedings ("Motion to Compel"), and states:

I. BASIS OF OPPOSITION AND PREFERRED DISPOSITION

If there was an actual agreement to arbitrate as RSL argues in its pending Motion to Compel, RSL would have filed a concise brief citing the arbitration provision and requesting the Court to enforce the parties' arbitration agreement. RSL didn't file such a brief because there is no arbitration clause in any of Mr. Petke's contracts with RSL. Instead, RSL filed an 18-page motion spinning convoluted factual and legal arguments that are ultimately untenable because RSL wants to hide its egregious misconduct from the public and a jury by sweeping Mr. Petke's lawsuit under a rug of arbitration.

Make no mistake, Mr. Petke's lawsuit is no publicity stunt as RSL alleges in its opening brief. If this lawsuit were a ruse, RSL would not have recently sacked a material fact witness—RSL's now former General Manager Craig Waibel—whose emails and statements attacking RSL's decision to fire Mr. Petke are quoted throughout Mr. Petke's complaint. Furthermore, if Mr. Petke's lawsuit was merely a sham, RSL would be filing pleadings addressing the merits of Mr. Petke's lawsuit rather than dodging them with a motion to compel arbitration despite being unable to identify any arbitration clause in the contracts between these parties.[1]

[1] In fact, RSL is so concerned about the potential of a jury of Mr. Petke's peers deciding this case that RSL's attorney issued a letter to Major League Soccer Commissioner Don Garber yesterday afternoon, October 14, 2019, pleading for the Commissioner to immediately enter "an order commencing arbitration by setting a schedule to conduct the arbitration." (*See* Exhibit ("Ex. C") attached hereto.) If the Court denies the Motion to Compel, which it should, Mr. Petke also requests the Court to determine that Mr. Petke is relieved from obeying any order issued by Commissioner Garber purportedly compelling the parties to arbitrate Mr. Petke's claims filed in this Court.

In this Memorandum in Opposition, Mr. Petke raises five independent reasons why the Court should deny RSL's Motion to Compel. First, RSL fails to adduce admissible evidence of any agreement between Mr. Petke and RSL to arbitrate their disputes. Instead, RSL presents the Court with an unsigned, undated, and unauthenticated document titled "MLS Constitution as of January 1, 2017" ("Alleged Constitution") marked as Exhibit B to the Motion to Compel. The Alleged Constitution should be stricken and disregarded because it violates the parol evidence rule, constitutes rank hearsay, and is not properly authenticated. If Exhibit B to the Motion to Compel is stricken and disregarded, the Court's analysis ends, and the Motion to Compel must be denied.

Second, the Employment Agreement marked as Exhibit A to the Motion to Compel shows Mr. Petke and RSL never agreed to arbitrate their disputes because it does not include an arbitration clause, and the words "arbitrate" or "arbitration" are not found in the document. Moreover, the Employment Agreement's clear and express terms show Mr. Petke and RSL specifically agreed to have their disputes resolved in this Court because § 7.08 states that "the parties consent to the jurisdiction of any appropriate court in the State of Utah to resolve" their disputes.

Third, RSL cannot import the "Dispute Resolution" provisions from the Alleged Constitution into the Employment Agreement because RSL cannot satisfy the rigorous requirements for incorporating the collateral document by reference into the parties' contract.

Fourth, if the Alleged Constitution's "Dispute Resolution" provisions were incorporated by reference into the parties' agreement, which Mr. Petke denies, the alleged "Dispute Resolution" provision is illusory and unenforceable because Major League Soccer's ("MLS") Commissioner reserved the complete and unfettered right to revoke arbitration "for any reason" based on his "sole discretion."

Finally, if the so-called "Dispute Resolution" procedures were incorporated by reference, the Motion to Compel should still be denied because the procedures are substantively unconscionable. For instance, the parties' contract lacks mutuality and only Mr. Petke is required to arbitrate his disputes in an expensive, distant, and inconvenient forum. Next, the "Dispute Resolution" procedures do not afford Mr. Petke the right to obtain discovery, which is impermissible in employee-employer disputes and also likely violates the Utah Uniform Arbitration Act. Third, the arbitrator under the "Dispute Resolution" procedures—MLS's Commissioner or his designee—has an incurable conflict of interest because the Commissioner is a material fact witness in this case.

II. OBJECTIONS TO EVIDENCE AFFIXED TO RSL'S MOTION TO COMPEL

Mr. Petke raises three independent objections to the Alleged Constitution marked as Exhibit B to RSL's Motion to Compel. First, Mr. Petke objects to the Alleged Constitution because it constitutes impermissible parol evidence. As RSL's Motion to Compel demonstrates, the Alleged Constitution was not attached as an exhibit to the Employment Agreement and is not signed by Mr. Petke and RSL. Further, this document is not specifically incorporated by reference into the Employment Agreement, which includes a merger clause in § 7.10. In addition, Mr. Petke objects to the Alleged Constitution as hearsay because it is an out-of-court statement offered to prove the truth of the matter asserted in the statement. Finally, Mr. Petke objects because the Alleged Constitution is not authenticated. If the Court sustains any ones of these objections, the Court should strike the Alleged Constitution from the record and disregard the document. Moreover, if the Court sustains any one of these objections, the Court may end its analysis and

deny the Motion to Compel because, as shown below, the Employment Agreement affixed to RSL's Motion to Compel does not include an agreement to arbitrate.

III. STATEMENT OF RELEVANT FACTS

1. Mr. Petke and RSL entered into an Employment Agreement effective September 30, 2017. (*See* RSL's Motion to Compel ("Mot.") at Ex. A.) The Employment Agreement's term was for three years and discusses, among other things, the parties' respective duties, the compensation Mr. Petke would receive to serve as the head coach of RSL, and the termination of the Employment Agreement. (*See generally id.*)

2. The Employment Agreement includes ***only*** one attachment: a Compensation Schedule. (*See id.*)

3. The Employment Agreement ***does not*** include an arbitration clause and does not include the words "arbitration" or "arbitrate" within its four corners. (*See generally id.*).

4. Conversely, the Employment Agreement includes the following provision, which RSL conveniently fails to acknowledge or address in its Motion to Compel:

> 7.08 Governing Law. This Agreement, and all matters relating hereto, including any matter or dispute arising out of the Agreement, shall be interpreted, governed, and enforced according to the laws of the State of Utah, ***and the parties hereto consent to the jurisdiction of any appropriate court in the State of Utah to resolve such disputes***.[2]

(*See id.* at 10, § 7.08 (emphasis added).)

[2] The fact that Employment Agreement § 7.08 is titled "Governing Law" does not limit its scope because § 7.06 states that "paragraph headings of this Agreement are inserted only for convenience *and in no way define, limit or describe the scope or intent of this Agreement nor affect its terms and provisions.*" (*See id.* at 10, § 7.06 (emphasis added).)

5. The Employment Agreement also expressly permits amendments at "any time upon mutual agreement of the parties hereto, which amendments must be reduced to writing and signed by both parties to become effective." (*Id.* at 10, § 7.09.)

6. On July 29, 2019, Mr. Petke and RSL's Executive Vice President of Soccer Operations, Robert Zarkos, signed another agreement titled "Violation of Club Policy" ("July 2019 Contract").[3] (*See* Declaration of Mike Petke ("Petke Dec.") affixed as Ex. A hereto and attachment 1 thereto.) The July 2019 Contract, which expressly refers to the Employment Agreement, addresses Mr. Petke's conduct after a RSL soccer match on July 24, 2019 and identifies specific punishment imposed by RSL upon Mr. Petke for his conduct after the match. (*Id.*) The punishment included: (1) suspension from all club activities, without pay, for two weeks; (2) mandatory anger management counseling, with a therapist chosen by RSL; and (3) Mr. Petke must issue written apologies to certain individuals. (*Id.*) More importantly, the July 2019 Contract states that RSL was giving Mr. Petke another opportunity rather than firing him. (*Id.*)

7. Like the Employment Agreement, the July 2019 Contract does not include an arbitration agreement and never mentions or otherwise references the words "arbitration," "arbitrate," or any derivative thereof. (*See id*.)

[3] RSL's Motion to Compel conveniently ignores the July 2019 Contract, which is referred to, cited, and attached to the Complaint and Jury Demand as Exhibit A.

8. Despite amending the Employment Agreement by entering into the July 2019 Contract to provide that only *future* infractions could result in Petke's immediate dismissal for cause, RSL removed Petke as head coach of the soccer club *the day before* Mr. Petke's two-week suspension without pay concluded. (*See, e.g.,* Mr. Petke's Complaint and Jury Demand ("Compl.") at ¶¶ 74-81.) RSL also executed a publicity campaign designed to damage Mr. Petke's reputation and detrimentally impact his future job prospects in professional soccer. (*Id.* at ¶¶ 81-85.)

9. Considering RSL's conduct, Mr. Petke filed a Complaint and Jury Demand alleging seven causes of action: (1) breach of contract; (2) violation of the duty of good faith and fair dealing; (3) promissory estoppel; (4) quantum meruit/unjust enrichment; (5) intentional infliction of emotional distress; (6) defamation; and (7) false light. (*See generally id.*)

10. On September 24, 2019, MLS sent a letter to Mr. Petke's counsel demanding Mr. Petke "immediately withdraw his complaint in Utah state court" based on an alleged arbitration provision in § 2.D.3 of the MLS Constitution. (*See* Mot. at Ex. C). *But MLS's letter did not enclose a copy of the alleged MLS Constitution*. (*Id.*)

11. The following day, September 25, 2019, Mr. Petke's counsel responded to MLS arguing that Employment Agreement § 7.08 requires this dispute be filed and litigated in a Utah court. (*See* Declaration of Clayton E. Bailey ("Bailey Dec.") affixed as Ex. B and attachment 1 thereto.) Mr. Petke's counsel also requested MLS to provide "the legal authority MLS is relying on for its position, including a complete copy of MLS's Constitution." (*Id.*)

12. On September 27, 2019, MLS replied arguing that it disagrees with Mr. Petke's interpretation of the Employment Agreement. (Bailey Dec. at attachment 2.) And although Mr. Petke's counsel requested a "complete copy of MLS's Constitution," MLS merely sent Mr. Petke a ***redacted excerpt*** from the purported MLS Constitution. (*See id.*)

13. Because MLS failed to provide Mr. Petke with a complete unredacted copy of the applicable MLS Constitution, Mr. Petke's counsel again requested a complete copy of the document and offered to sign a non-disclosure agreement. (Bailey Dec. at attachment 3.)

14. Mr. Petke's counsel also requested MLS to provide "any documentation in MLS's possession, custody or control demonstrating that Mr. Petke has previously received the applicable MLS Constitution and/or had an opportunity to previously review the Constitution." (*Id.*)

15. MLS ultimately produced a copy of the Alleged Constitution on Thursday, October 3, 2019 (just 2 business days before RSL filed its Motion to Compel), but ***never provided any documentation*** demonstrating Mr. Petke previously received the document or had an opportunity to previously review the Alleged Constitution. (Bailey Dec. at ¶¶ 6-8 and Attachment 4.)

IV. ARGUMENT & AUTHORITIES

A. RSL's Motion to Compel should be denied because there is no direct and specific evidence on the face of the Employment Agreement or the July 2019 Contract that Mr. Petke and RSL agreed to arbitration; rather, the express language in those contracts evidences an intent to submit the dispute to this Court.

Because "arbitration is a contractual remedy for the settlement of disputes,"[4] the Court should deny RSL's Motion to Compel; the clear and unambiguous language within the eight corners of the Employment Agreement and July 2019 Contract show that Petke and RSL never agreed to

[4] *Lindon City v. Engr's Constr. Co.*, 636 P.2d 1070, 1073 (Utah 1981).

arbitration. Rather, the express language of the Employment Agreement demonstrates the parties intended the opposite—to present their disputes to *this Court* for resolution.

Arbitration is a matter of contract law and Utah state law principles of contract formation apply.[5] *Ellsworth v. The Am. Arbitration Ass'n*, 148 P.3d 983, 987 (Utah 2006). As with any contract, the Court must determine what Petke and RSL agreed upon by looking first to the plain language within the eight corners of the Employment Agreement and the July 2019 Contract. *Peterson & Simpson v. IHC Health Servs., Inc.*, 217 P.3d 716, 720 (Utah 2009). "While there is a presumption in favor of arbitration, that presumption applies *only when arbitration is a bargained-for remedy of the parties*." *Ellsworth*, 148 P.3d at 987 (emphasis added).

As the movant, RSL has the burden of presenting "direct and specific evidence of an agreement [to arbitrate] *between the parties*." *Id.* (emphasis added). "Direct and specific evidence requires non-inferential evidence," and "it requires an agreement between the *particular* parties regarding arbitration of future disputes." *Id*. at 987-988 (emphasis in original).

Here, RSL's 18-page Motion to Compel fails to adduce any direct and specific evidence showing the parties manifested assent to an agreement to arbitrate their disputes. For instance, RSL never identifies an arbitration clause in either the Employment Agreement or the July 2019 Contract. In fact, RSL does not contend that either the Employment Agreement or the July 2019 Contract include the words "arbitrate," "arbitration," or any derivative thereof.

On the other hand, the admissible evidence affixed to the Motion to Compel demonstrates that the parties intended to submit their disputes to this Court. Employment Agreement § 7.08

[5] The parties agreed that Utah law governs the interpretation and enforcement of the Employment Agreement. (*See* Mot. at Ex. A, p. 10, § 7.08.)

states that "the parties hereto consent to the jurisdiction of any appropriate court in the State of Utah to resolve such disputes." (Mot. at Ex. A, p. 10, § 7.08.)

The clear and unambiguous language within the Employment Agreement defeats RSL's Motion to Compel. If the parties actually assented to arbitration as RSL alleges, there would be no directly contradictory language in Employment Agreement § 7.08 stating that the parties agree to resolve their disputes in an appropriate Utah state court.

Because there is no direct and specific admissible evidence on the face of the parties' contracts that Mr. Petke and RSL agreed to arbitration, the Motion to Compel should be denied.

B. The Alleged Constitution's "Dispute Resolution" provisions were not incorporated into the parties' Employment Agreement or the July 2019 Contract.

Because RSL cannot identify an arbitration provision within either the Employment Agreement or the July 2019 Contract, RSL improperly attempts to import the Alleged Constitution's "Dispute Resolution" provisions. But even if the Court considers the Alleged Constitution (which it should not for the reasons explained above), RSL's reliance on the Alleged Constitution's "Dispute Resolution" provisions are misplaced because this collateral document and its terms were not properly incorporated into either the Employment Agreement or the July 2019 Contract. Consequently, Petke never even had notice of any arbitration provision in the Alleged Constitution and thus could not have assented to such a provision.

A contract may include a separate writing or portions thereof *only* if properly incorporated by reference. Incorporation by reference requires that "'the reference . . . be clear and unequivocal, and alert the non-drafting party that terms from another document are being incorporated.'" *Peterson & Simpson v. IHC Health Servs., Inc.*, 217 P.3d 716, 721 (Utah 2009) (quoting *Hous. Auth. of the Cty. of Salt Lake v. Snyder*, 44 P.3d 724, 729 (Utah 2002)). "Additionally, the party

'must consent thereto, and the terms of the incorporated documents must be known or easily available to the contracting parties.'" *Id*. (quoting *Consol. Realty Grp. v. Sizzling Platter, Inc.*, 930 P.2d 268, 273 (Utah Ct. App. 1996)).

While there is a dearth of case law from Utah considering a factual pattern similar to the facts here, there are several opinions from Florida[6] that are instructive because they concern attempts by one party to compel arbitration by referencing an arbitration clause in a collateral document. *See, e.g., Affinity Internet, Inc. v. Consolidated Credit Counseling Servs., Inc.*, 920 S.2d 1286, 1288-1289 (Fla. Ct. App. 2006); *Temple Emanu-El of Greater Fort Lauderdale v. Tremarco Indus., Inc.*, 705 So.2d 983, 984 (Fla. Ct. App. 1998); *St. Augustine Pools, Inc. v. James M. Barker, Inc.*, 687 So.2d 957, 958-59 (Fla. Ct. App. 1997).

Affinity Internet, Inc. v. Consolidated Credit Counseling Services, Inc. is particularly instructive. There, the court examined whether the online agreement between the parties contained an arbitration clause that would compel Consolidated Credit to enter into binding arbitration with Affinity. 920 S.2d 1286, 1287 (Fla. Ct. App. 2006). The parties had previously entered into a computer and web hosting internet services contract. *Id.* Consolidated then filed a lawsuit and Affinity tried to compel arbitration because the parties' contract stated it was "subject to all of SKYNetWEB's terms, conditions, user and acceptable use policies located at

[6] Considering case law from Florida in the arbitration context is proper because, as RSL contends, the Utah Uniform Arbitration Act applies (Mot. at 1), which is essentially adopted word for word from the Revised Uniform Arbitration Act ("RUAA"). *Westgate Resorts, Ltd. v. Adel*, 378 P.3d 93, 95 (Utah 2016). Florida likewise adopted the RUAA or substantial versions of it. *See* Fla. Stat. Ann. §§ 682.01-.25. One of the policies of the RUAA is to promote uniformity of arbitration law among the participating states. *See, e.g., Sun Valley Ranch 308 Ltd. P'ship, Inc. v. Robson*, 294 P.3d 125, 129 (Ariz. Ct. App. 2012).

http://www.skynetweb.com/company/legal/legal.php." *Id.* Paragraph 17 of the online user agreement included an arbitration clause. *Id.*

The court determined that the parties' contract did not contain an express agreement to arbitrate and only a statement that the contract was "subject to all of SKYNetWEB's terms, conditions, user and acceptable use policies," which were to be found at a separate website, and the arbitration clause was only contained in the online user agreement. *Id.* at 1287-1288. The court determined that *the mere reference to another document is not sufficient* to incorporate that other document into a contract. *Id.* at 1288. While the parties' contract stated that it was "subject to" the collateral document, the court found that this simple statement, "with nothing more," was insufficient to compel Consolidated to arbitrate. *Id.* The court's decision was also supported by the failure to attach the collateral document to the parties' contract and because a copy of the collateral document or the information contained therein was not provided to the signatory. *Id.*

If the *Affinity* court determined that the collateral document's arbitration clause was not incorporated by reference into the parties' agreement, then this Court should likewise find that the Alleged Constitution's "Dispute Resolution" provisions are not incorporated by reference because the facts here are even worse for RSL than those presented in *Affinity*. First, although Employment Agreement § 1.03 obliquely refers to "constitutions," the Employment Agreement never refers to any dispute resolution provisions in those "constitutions."[7] (*See* Mot. at Ex. A, p. 3, §§ 1.03-1.04.) Second, unlike *Affinity* where the parties' agreement at least referenced a web address where the

[7] RSL's contention that Employment Agreement § 1.04 supports compelling arbitration is unfounded because it merely authorizes MLS to punish Mr. Petke in certain situations. (*See* Mot. at Ex. A, pp. 3-4, § 1.04.) This provision also does not reference collateral documents and omits any reference to arbitration. Importantly, Mr. Petke's lawsuit against RSL does not involve any punishment meted out by MLS against him, but rather RSL's acts and omissions such as, but not limited to, its material breaches of its contractual obligations owed to Mr. Petke.

collateral agreement containing the arbitration clause could allegedly be reviewed, the Employment Agreement does not identify where Mr. Petke could have found a copy of any "constitutions." (*See generally* Mot. at Ex. A.) Third, unlike *Affinity*, there is no "subject to" language in § 1.03, which is the section referring to the "constitutions."

But that is not all. There is more. The record bolsters supporting a determination that the rules for incorporation by reference have not been satisfied. Specifically, the record demonstrates:

- a copy of the Alleged Constitution was not affixed to the Employment Agreement (*see* Mot. at Ex. A.);
- a copy of the Alleged Constitution was neither signed by Mr. Petke nor MLS (*see* Ex. B);
- RSL presents no evidence showing Mr. Petke was ever provided a copy of the Alleged Constitution (*see generally* Mot.);
- RSL fails to demonstrate Mr. Petke was ever made aware of the "Dispute Resolution" provisions in the Alleged Constitution (*id.*);
- RSL adduces no evidence showing anyone ever explained to Mr. Petke that the Alleged Constitution included a "Dispute Resolution" provision (*id.*);
- RSL presents no evidence that the Alleged Constitution was easily available to Mr. Petke when he signed the Employment Agreement on September 30, 2017 (*id.*);
- MLS's website does not include a copy of *any* MLS Constitution, let alone the Alleged Constitution (*see* Petke Dec. ¶ 13);

- when Mr. Petke's counsel requested a complete copy of the Alleged Constitution, MLS's General Counsel merely produced a three-page excerpt of the document that was redacted (Bailey Dec. at Attachment 2);
- Mr. Petke contends he neither received nor has possessed a copy of the Alleged Constitution (Petke Dec. ¶¶ 4-5);
- Mr. Petke states no one explained to him that the Alleged Constitution includes a "Dispute Resolution" provisions (*id.* ¶ 7);
- Mr. Petke represents that the first time he received the Alleged Constitution was when MLS produced redacted excerpts of the Alleged Constitution to his attorneys just 2 business days before RSL filed the Motion to Compel (*id.* ¶3); and
- Mr. Petke contends he never intended to enter into an agreement to arbitrate because the Employment Agreement says a court in Utah should resolve the parties' disputes. (*id.* ¶ 8.)

Collectively, the language in the parties' agreements, coupled with the facts in the record, demonstrate that the Employment Agreement's mere reference to "constitutions" in § 1.03 is not sufficient to incorporate the Alleged Constitution's "Dispute Resolution" provisions into either the Employment Agreement or the July 2019 Contract. Moreover, if the collateral document was incorporated by reference, its "Dispute Resolution" provisions would render Employment Agreement § 7.08 partially meaningless because it would preclude giving effect to the Employment Agreement's provisions and terms, an outcome that must be avoided under Utah law.

See Peterson & Simpson, 217 P.3d at 720 (instructing courts to interpret contracts by looking for a reading that harmonizes all provisions and avoids rendering any provision meaningless).[8]

For all these reasons, the Motion to Compel should be denied as a matter of law.

C. If the Alleged Constitution's "Dispute Resolution" provisions apply, it is nevertheless illusory and unenforceable, and the Motion to Compel should be denied.

If the Court determines the Alleged Constitution's "Dispute Resolution" provisions were incorporated by reference into the Employment Agreement, which Mr. Petke denies, the Court should still deny the Motion to Compel because the "Dispute Resolution" provisions are illusory and unenforceable. Under Utah law, formation of a contract generally requires an offer, acceptance, and consideration. *Cea v. Hoffman*, 276 P.3d 1178, 1185 (Utah Ct. App. 2012). However, where a party reserves an absolute and unconditional power to terminate a contract, the contract is illusory and unenforceable. *Res. Mgmt. Co. v. Western Ranch & Livestock Co., Inc.*, 706 P.2d 1028, 1037 (Utah 1985).

Here, RSL claims Mr. Petke must submit to arbitration before MLS's Commissioner under Alleged Constitution § 2(C) and (D). (*See* Mot. at 11-13.) But RSL conveniently fails to acknowledge and address Alleged Constitution § 2(E), which states:

> E. Right to Designate or Decline. Notwithstanding the foregoing, the Commissioner may, *in his sole discretion*, . . . (iii) *decline to arbitrate any dispute* listed in Section 2.D.1-4 *that the Commissioner determines* should not be arbitrated by the Commissioner *for any reason*.

[8] If Mr. Petke and RSL intended to make the Alleged Constitution's "Dispute Resolution" provisions part of their contracts, they could easily have accomplished that purpose by drafting their agreements employing words of express incorporation or clearly referencing, identifying, and directing Mr. Petke to the Alleged Constitution's "Dispute Resolution" provisions. They also could have attached the Alleged Constitution to the Employment Agreement as an exhibit. But the parties did not express their intent in that fashion within their contracts because that is not what they intended.

(*See* Mot. at Ex. B, p. 14, § 2.E (emphasis added).)

The language in § 2.E renders the arbitration clause illusory and unenforceable because it reserves for the Commissioner the complete and unfettered right to revoke arbitration "for any reason" in his unbridled "discretion." Accordingly, binding legal precedent requires that RSL's Motion to Compel be denied as a matter of law.

D. The Court should deny the Motion to Compel on the grounds that the Alleged Constitution's "Dispute Resolution" provisions are substantively unconscionable.

Assuming, *arguendo*, the Court determines the Alleged Constitution's "Dispute Resolution" provisions were incorporated by reference into the parties' Employment Agreement or the July 2019 Contract, the Court should nevertheless deny the Motion to Compel because the "Dispute Resolution" provisions are substantively unconscionable.

Substantive unconscionability is part of a two-pronged analysis Utah courts use for determining whether an arbitration agreement is unconscionable. *Sosa v. Paulos*, 924 P.2d 357, 360 (Utah 1996). Utah courts consider whether a contract provision is unconscionable in light of the twofold purpose of the doctrine, which is the prevention of oppression and unfair surprise. *Res. Mgmt.*, 706 P.2d at 1041. The Utah Supreme Court has determined that substantive unconscionability *alone* may support a finding that an agreement is unenforceable as unconscionable. *Sosa*, 924 P.2d at 361.

Substantive unconscionability focuses on "the contents of an agreement, examining the 'relative fairness of the obligations assumed.'" *Id.* (quoting *Res. Mgmt.*, 706 P.2d at 1043). In assessing whether an arbitration agreement is substantively unconscionable, the Court must consider whether the agreement's terms are "so one-sided as to oppress or unfairly surprise an

innocent party or whether there exists an overall imbalance in the obligations and rights imposed by the bargain . . . according to the mores and business practices of the time and place.'" *Id.*

The *Owner-Operator Independent Drivers Association v. C.R. England, Inc.* opinion issued by the Utah federal district court is instructive. 325 F. Supp.2d 1252 (D. Utah 2004). There, the court determined an arbitration clause was substantively unconscionable and unenforceable because one of the parties to the agreement could "act unfettered by any requirement to arbitrate" whereas the other party was purportedly bound to "submit any and all disputes to an expensive arbitration proceeding in a distant and inconvenient forum." *Id.* at 1263.

The Court should follow *C.R. England* and likewise find that the Alleged Constitution's "Dispute Resolution" provision is substantively unconscionable. The two sections of the Employment Agreement RSL relies on to contend that Mr. Petke agreed to arbitration—§§ 1.03 and 1.04—*relate solely to Mr. Petke*. (*See* Employment Agreement § 1.03 ("Employee covenants and agrees . . . ."); § 1.04 ("Employee expressly acknowledges that Employee is subject to the jurisdiction of the League Commissioner . . . .").) Additionally, RSL's recent letter demanding that MLS's Commissioner issue an order allegedly "commencing arbitration" further demonstrates the "Dispute Resolution" provision's substantively unconscionable unilateral nature. (*See* Ex. C ("Mr. Petke, as an employee of RSL, expressly acknowledges that [he] is subject to . . . .") ("Mr. Petke also covenanted and agreed that he will 'comply with . . . .").)

Because neither §§ 1.03 nor 1.04 apply to RSL, the club can act unfettered by any requirement to arbitrate under the Employment Agreement or the July 2019 Contract. In stark contrast, Mr. Petke is (according to RSL) purportedly bound to submit all of his disputes in this lawsuit to an arbitration proceeding before MLS's Commissioner, who offices in Manhattan,

which is an expensive, distant, and inconvenient forum given that all the events occurred in Utah, and the documents and nearly all of the witnesses are located in the Salt Lake City area.

Next, the "Dispute Resolution" procedures provide for no discovery and thus curtail Mr. Petke's ability to substantiate any of his claims against RSL. In employee-employer disputes, courts have determined that employees "are entitled to discovery sufficient to adequately arbitrate" their claims, "including access to essential documents and witnesses." *See, e.g., Armendariz v. Found. Health Psychcare Servs., Inc.*, 6 P.3d 669, 684 (Cal. 2000); *see also Narayan v. The Ritz-Carlton Dev. Co., Inc.*, 400 P.3d 544, 554-555 (Haw 2017); *Ferguson v. Countrywide Credit Indus., Inc.*, 298 F.3d 778, 786-87 (9th Cir. 2002).

Here, the Alleged Constitution's "Dispute Resolution" procedures do not afford Mr. Petke the opportunity to issue written discovery to RSL like requests for production, interrogatories, or requests for admissions. Additionally, the procedures do not allow Mr. Petke to take depositions, to subpoena documents from third-parties, or to subpoena witnesses for deposition. Each of these discovery tools is necessary for Mr. Petke to collect information so he may vindicate his rights under Utah state law. Because the "Dispute Resolution" procedures do not expressly authorize Mr. Petke to obtain discovery from RSL or third-parties, the procedures violate Utah Code Ann. § 78B-11-118 (discussing discovery in arbitrations).

Mr. Petke anticipates RSL will likely argue in its reply brief that the "Dispute Resolution" procedures apply to both parties and thus they are not substantively unconscionable. However, such an argument is irrelevant and has been rejected by courts because an employer, like RSL, is in a far better position because it almost certainly "'has in its possession many of the documents relevant to'" this case, "'as well as having in its employ many of the relevant witnesses.'" *Fitz v.*

NCR Corp., 118 Cal. App.4th 702, 717 (Cal. Ct. App. 2004) (quoting *Mercuro v. Superior Court*, 96 Cal. App.4th 167, 183 (Cal. Ct. App. 2002); *see also Kinney v. United HealthCare Servs., Inc.*, 70 Cal. App.4th 1322, 1332 (Cal. Ct. App. 1999) ("Given that [the employer] is presumably in possession of the vast majority of evidence that would be relevant to employment-related claims against it, the limitations on discovery, although equally applicable to both parties, work to curtail the employee's ability to substantiate any claims against [the employer]."). The courts' rationale is equally applicable here because RSL has the documents in its custody, possession or control and the vast majority of witnesses are within its employ.

Finally, the Alleged Constitution's arbitration clause should be stricken as unconscionable because the arbitrator—that is, MLS's Commissioner Don Garber—is a material fact witness in this case. (*See* Compl. ¶¶ 51, 54, & 64; RSL's initial disclosures filed October 7, 2019.) Accordingly, neither Mr. Garber nor anyone else from MLS's Commissioner's office sitting by designation can serve as an arbitrator in this dispute because of the incurable conflict-of-interest that exists. Indeed, to compel this case to arbitration under the Alleged Constitution's "Dispute Resolution" procedures would violate Utah Code Ann § 78B-11-113 because Mr. Petke is entitled to a neutral and impartial arbitrator.

Considering all the above, the Motion to Compel should be denied because the Alleged Constitution's "Dispute Resolution" procedures are substantively unconscionable and unenforceable as a matter of law.

V. CONCLUSION

The general rule of arbitration agreements is that one who has not manifested assent to an agreement to arbitrate cannot be required to submit to arbitration. As demonstrated above, Mr.

Petke never agreed to arbitration and RSL's attempt to import an arbitration provision from an inadmissible collateral document that Mr. Petke never received or signed and that was not attached to the parties' agreements lacks merit. But even if the arbitration provision is incorporated by reference, the Court should conclude that the provisions are illusory and substantively unconscionable. Therefore, Mr. Petke requests the Court to deny the Motion to Compel and grant Mr. Petke such other and further relief to which he may be entitled both at law and equity.[9]

DATED this 15th day of October, 2019.

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[9] If the Court grants the Motion to Compel, the case can only be stayed and *not dismissed* as RSL requests. *Mariposa Express, Inc. v. United Shipping Sol., LLC*, 295 P.3d 1173, 1178 (Utah Ct. App. 2013) (reversing and remanding for reinstatement a trial court's dismissal of an action compelled to arbitration).

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MIKE PETKE

CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of October, 2019, I caused a true and correct copy of the foregoing **MEMORANDUM OF LAW IN OPPOSITION OF DEFENDANT'S MOTION TO COMPEL ARBITRATION AND DISMISS OR, IN THE ALTERNATIVE, STAY THE PROCEEDINGS** to be served via the Court's electronic notice and filing system upon counsel of record:

/s/ Ryan B. Braithwaite
Ryan B. Braithwaite